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Supreme Court, U.S.
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No. 94-35

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

STATE OF ALABAMA and
JAMES E. FOLSOM, Governor,
State of Alabama, Petitioners,

v.

POARCH CREEK INDIANS and POARCH BAND OF
CREEK INDIANS, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

STANDING

The Brief in Opposition suggests that the State of Alabama and its Governor (hereafter "Alabama") have no standing as they secured a favorable judgment below. Did the State secure a favorable judgment? Did the State really prevail, or did the Tribe by losing the battle win the war in the very same contest?

For more than fifty years this Court has recognized that the "prevailing" party, in some instances, has standing to seek reformation of a decree. Electrical Fittings Corporation v. Thomas & Betts Company, 307 U.S. 241, 242 (1939); Deposit Guaranty National Bank v. Roper, 445 U.S. 326, 335 (1980); Partmar Corp. v. Paramount Theatres Corp., 347 U.S. 89 (1953). No decision cited by the Tribe stands for the proposition that a party is

prohibited from accepting the favorable portion of a judgment, while seeking review of the unfavorable portion.

The Tribe cites Johnson v. DeGrandy, 62 U.S.L.W. 4755, 4757, n. 5 (U.S. June 30, 1994) and California v. Rooney, 483 U.S. 307, 311 (1987) for the proposition that a party securing a favorable judgment will not be granted review based on the party's belief that the opinion below contains unfavorable language. Title 28 U.S.C. § 1254 provides that **cases** in the courts of appeal **may be reviewed** by the Supreme Court by writ of certiorari granted upon a **petition of any party** to any civil case.

That portion of the opinion of the Eleventh Circuit characterized by the Poarch Band as "unfavorable language" is much more than that. Providing that the Secretary of the Interior may prescribe

regulations for Class III gaming clearly transforms a "favorable judgment" into a matter where the "favorable judgment" is actually in favor of the "losing party" -- the Poarch Band -- rather than Alabama. There is, at least in the eyes of the Ninth Circuit, nothing at all "favorable" about Part V. of the Eleventh Circuit's judgment. Spokane v. Washington State, 1994 WL 316443 *6.

There is an old adage that goes, "let's give him a fair trial and then hang him." Well, Alabama got her fair trial and then got hung.

RIPENESS

While Alabama has taken the position that the language in Part V. of the Eleventh Circuit opinion is "arguably dicta," the Tribes, the Secretary of the

Interior[1] and the Ninth Circuit Court of Appeals in Spokane v. Washington State, 1994 WL 316443 (9th Cir. 1994) certainly do not treat it as dicta.

The Ninth Circuit stated:

> The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. Those concerns illustrate the problem caused when state sovereignty is injected into the federal scheme. The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the

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[1]Tribes have filed applications with the Secretary pursuant to that language. See Florida's Cross-Petition for Certiorari, p. 9, fn. 2. Furthermore, Alabama has been informed by the Department of the Interior that preliminary steps toward prescribing gaming regulations have been taken pursuant to the Eleventh Circuit's opinion. See Alabama's Petition for Certiorari, p. 10, fn. 3 and p. 11, fn. 4.

> Secretary of the Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. Seminole Tribe, 11 F.3rd at 1029. In our view, however, such a result would pervert the congressional plan. This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations. 25 U.S.C. § 2710(d) (7) (B) (iv)-(vii). The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.

Spokane, 1994 WL 316443 *6. (Emphasis added.)

The Ninth Circuit clearly found that the judicially-created remedy of the Eleventh

Circuit was "contrary to the congressional aim of state participation."

Additionally, while the question of what action, if any, the Secretary may take under the Administrative Procedure Act, 5 U.S.C. §§ 701, et seq., may not be ripe for review, that is not the question presented in Alabama's Petition. The question before this Court concerns the judicially-created remedy itself, not how that remedy is implemented.

CONCLUSION

By explicitly rejecting the Eleventh Circuit's Secretarial remedy, the Ninth Circuit has established an additional basis for granting Alabama's Petition. There now exists a direct conflict between Part V. of the judgment of the Eleventh Circuit and the judgment of the Ninth Circuit set forth above calling for the granting of certiorari by this Court.

Respectfully submitted,

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